

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Preferred Materials, Inc., d/b/a Conrad)
Yelvington Distributors,) C.A. No.: 9:25-cv-00404-DCN
)
 Plaintiff,)
)
 v.) **COMPLAINT**
) (ACTION ON PAYMENT BOND)
) (BREACH OF CONTRACT)
)
 Kenneth Scott Builders, Inc., American)
 Alternative Insurance Corporation, and)
 Kenneth Scott Tosky, a/k/a)
 Kenneth S. Tosky)
)
 Defendants.) *Nonjury*
)
)

The Plaintiff above named, complaining of the Defendants above named, alleges:

FACTUAL ALLEGATIONS

1. The Plaintiff is a corporation organized and existing pursuant to the laws of the State of Georgia, with its principal place of business located in the State of Florida.
2. Defendant Kenneth Scott Builders, Inc. is a corporation organized and existing pursuant to the laws of the State of South Carolina, with its principal place of business located therein, which has in the past and continues to engage in construction projects in Jasper County, South Carolina.
3. Defendant American Alternative Insurance Corporation is an insurance company organized pursuant to the State of Delaware, with its principal place of business located in New Jersey.
4. Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, is a citizen and resident of

Beaufort County, South Carolina.

5. There exists complete diversity of citizenship between the Plaintiff and all Defendants.

6. This Court has jurisdiction over the matters alleged herein pursuant to 28 U.S.C. §1332, and venue is proper in this District pursuant to 28 U.S.C. §1391.

7. On or about December 31, 2014, Kenneth Scott Builders, Inc. submitted a credit application to Preferred Materials, Inc., whereby it requested to purchase materials on open account, and agreed to pay the charges for all items ordered within thirty days of purchase; a true and correct copy of the credit application submitted by Kenneth Scott Builders, Inc. is attached to this Complaint as Exhibit "A."

8. On or before May 1, 2023, Omega Construction, Inc. contracted with HI 1-B, LLC for construction work to be performed on property owned by HI 1-B, LLC located in Jasper County, South Carolina, known and designated as Gateway Commerce Center.

9. On or about May 1, 2023, Omega Construction subcontracted with Defendant Kenneth Scott Builders, Inc. to provide materials and labor for the construction of the Gateway Commerce Center located in Jasper County, South Carolina.

10. On or about June 12, 2023, Defendant Kenneth Scott Builders, Inc., as principal, and American Alternative Insurance Corporation, as surety, issued a Payment Bond, number S7A2SU0000870, wherein they covenanted to make payment for all contractors and materialmen who perform services benefitting or supply materials used in construction upon the property and associated structures on the Gateway Commerce Center project being performed by Kenneth Scott Builders, Inc.; a true and correct copy of the said Bond is attached hereto as Exhibit "B" to this

Complaint.

11. On or before November 21, 2023, Kenneth Scott Builders, Inc. contracted with Plaintiff to provide materials to and for the benefit of the construction of the property and associated structures on the Gateway Commerce Center project.

12. From November 21, 2023 through February 19, 2024, the Plaintiff provided and supplied materials to Kenneth Scott Builders, Inc. for incorporation into the construction of the property and associated structures on the Gateway Commerce Center project

13. On or about December 4, 2023, the Plaintiff gave notice to Defendant Kenneth Scott Builders, Inc. and to the owner of the Gateway Commerce Center of the fact that it was supplying materials to Kenneth Scott Builders, Inc. for incorporation into the construction of the property and associated structures on the Gateway Commerce Center project, and of the amount of the materials being provided and the amount due.

14. The goods, materials, equipment and supplies sold by the Plaintiff to Defendant Kenneth Scott Builders, Inc. were intended to be and were used for the improvement of and upon the property and associated structures on the Gateway Commerce Park project pursuant to the contract between Kenneth Scott Builders, Inc. and Omega Construction Company.

15. The Plaintiff has supplied materials and equipment in the value of Two Hundred Eighty-Six Thousand, Nine Hundred Sixty-Two and 89/100 (\$286,962.89) Dollars for use upon the construction of property and associated structures on the Gateway Commerce Center project, for which it has not been paid.

16. The Plaintiff last supplied material for use upon the project on February 19, 2024.

FOR A FIRST CAUSE OF ACTION AGAINST BOTH DEFENDANTS
(Action Upon Payment Bond)

17. The allegations of Paragraphs One (1) through Sixteen (16) of this Complaint are realleged as if repeated herein verbatim.

18. On or about September 16, 2024, the Plaintiff properly gave notice to Kenneth Scott Builders, Inc. and American Alternative Insurance Corporation of the claim by the Plaintiff of entitlement to payment under the Payment Bond pursuant to SC Code Ann §11-35-3030; a true and correct copy of the said Notice is attached hereto as Exhibit "C."

19. Kenneth Scott Builders, Inc. and American Alternative Insurance Corporation have been and were properly served with the notice of the bond claim under SC Code Ann §11-35-3030.

20. Since the service of the aforesaid notice, no person or party has paid the account due.

21. By reason of the foregoing, the Plaintiff is entitled to the payment from Defendants Kenneth Scott Builders, Inc. and American Alternative Insurance Corporation under the said Payment Bond in the sum of Two Hundred Eighty-Six Thousand, Nine Hundred Sixty-Two and 89/100 (\$286,962.89) Dollars.

**FOR A SECOND CAUSE OF ACTION AGAINST
DEFENDANT KENNETH SCOTT BUILDERS, INC.**
(BREACH OF CONTRACT)

22. The allegations of Paragraphs One (1) through Twenty-One (21) of this Complaint are realleged as if repeated herein verbatim.

23. The Plaintiff has demanded that Defendant Kenneth Scott Builders, Inc. pay the balance due for the materials sold to it and used upon the construction of the property and associated structures on the Gateway Commerce Center project located in Jasper, South Carolina, but the said

Defendant Kenneth Scott Builders, Inc. has failed and refused to pay for the same.

24. The failure of the said Defendant Kenneth Scott Builders, Inc. to make payment for the amount due constitutes a breach of contract.

25. By reason of the breach of contract by the Defendant Kenneth Scott Builders, Inc., the Plaintiff is entitled to recover against the Defendant Kenneth Scott Builders, Inc. in the sum of Two Hundred Eighty-Six thousand, Nine Hundred Sixty-Two and 89/100 (\$286,962.89) Dollars, plus prejudgment interest at the rate of 1.5% per month from February 19, 2024 to the day and date of judgment hereunder, and all costs, expenses and attorneys' fees incurred by the Plaintiff in collecting the balance due.

FOR A THIRD CAUSE OF ACTION AGAINST
DEFENDANT KENNETH SCOTT TOSKY
(BREACH OF CONTRACT OF GUARANTY)

26. The Plaintiff repeats and realleges the allegations of Paragraphs One (1) through Twenty-Five (25) of this Complaint as if repeated herein verbatim.

27. As part of the credit application submitted by Kenneth Scott Builders, Inc. and as an integral part thereof, Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, agreed to be personally responsible for and personally guaranteed the obligations of Kenneth Scott Builders, Inc. to Preferred Materials, Inc., d/b/a Kenneth Yelvington Distributors; a true and correct copy of the personal guarantee by Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, is contained within the credit application attached to this Complaint as Exhibit "A."

28. Under the terms of his personal guaranty, Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, is indebted to Preferred Materials, Inc., d/b/a Conrad Yelvington Distributors in the amount of One Hundred Eight Thousand, Eight Hundred Eighty-Four and 02/100 (\$108,884.02)

Dollars, which balance has been due and payable since March 28, 2024.

29. Despite demands made by Preferred Materials, Inc., d/b/a Conrad Yelvington Distributors Co., Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, has failed and refused to pay the balance due by Kenneth Scott Builders, Inc. to Preferred Materials, Inc.

30. The failure of the Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, to pay the balance due by Kenneth Scott Builders, Inc. to Preferred Materials, Inc., d/b/a Conrad Yelvington Distributors constitutes a breach of the contract of guaranty by Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, causing damages to the Plaintiff.

31. Pursuant to the written contract between the parties, Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky has agreed to pay to Preferred Materials, Inc. interest at the rate of 1.5% per month of the past due balance and collection and attorneys' fees.

32. As a result of the aforesaid breach of contract by Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, the Plaintiff is entitled to recover judgment against Defendant Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, in the amount of One Hundred Eight Thousand, Eight Hundred Eighty-Four and 02/100 (\$108,884.02) Dollars, which balance continues to accrue interest from March 28, 2024 at the rate of 1.5% per month, plus collection costs and attorneys' fees.

WHEREFORE, Plaintiff prays that this Court take jurisdiction hereof and render judgment against the Defendants as follows:

A. Under the First Cause of Action, for judgment against Kenneth Scott Builders, Inc. and American Alternative Insurance Corporation in the sum of Two Hundred Eighty-Six Thousand, Nine Hundred Sixty-Two and 89/100 (\$286,962.89) Dollars plus prejudgment interest at the rate of 1.5% per month from February 19, 2024 to the day and date of judgment hereunder;

B. Under the Second Cause of Action for judgment against Defendant Kenneth Scott Builders, Inc. in the sum of Two Hundred Eighty-Six Thousand, Nine Hundred Sixty-Two and 89/100 (\$286,962.89) Dollars, plus prejudgment interest at the rate of 1.5% per month from February 19, 2024 to the day and date of judgment hereunder, plus the costs, expenses and attorneys' fees incurred in prosecuting this action;

C. Under the Third Cause of Action for judgment against Kenneth Scott Tosky, a/k/a Kenneth S. Tosky, in the sum of Two Hundred Eighty-Six Thousand, Nine Hundred Sixty-Two and 89/100 (\$286,962.89) Dollars, plus prejudgment interest at the rate of 1.5% per month from February 19, 2024 to the day and date of judgment hereunder, plus the costs, expenses and attorneys' fees incurred in prosecuting this action; and

D. For such other and further relief as this Court may deem just and appropriate.

BERNSTEIN & BERNSTEIN, P.A.

/s/Robert A. Bernstein

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January 21, 2025